No. 83-1918

Office Supreme Court, U.S
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ROBERT B. EUBANK, PETITIONER,
INDIVIDUALLY AND ON BEHALF OF ALL OTHER
SHAREHOLDERS OF LEE LUMBER COMPANY, LTD.,

VS.

LEE LUMBER COMPANY, LTD.,

Respondent

VS.

INTERNATIONAL PAPER COMPANY,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT, INTERNATIONAL PAPER COMPANY, IN OPPOSITION TO PETITION FOR CERTIORARI

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21 pp

QUESTIONS PRESENTED FOR REVIEW

1. Question No. 1 proposed for review by Petitioner is not presented by the factual and legal circumstances in this lawsuit, is inappropriate in this Petition for Certiorari and is quite inapplicable in any consideration of said Petition.

Respondent shows that both Judgments of the District Court below which preceded the Judgment of the Fifth Circuit Court of Appeal, now sought by Petitioner to be reviewed, are replete with findings of fact.

2. Question No. 2 proposed by Petitioner for review, it is respectfully submitted, is misleading and, as presented, inappropriate to his Petition.

Rule 47.6 of the Local Rules of the Fifth Circuit Court of Appeal specifically provides for affirmation of a Judgment of a District Court without opinion, under stipulated circumstances. In the body of his Petition, Petitioner stipulates that he takes no issue with Local Rule 47.6 itself, but with its application below.

3. Question No. 3 proposed by Petitioner for review necessarily assumes and presupposes a contravention of its own Local Rules by the Fifth Circuit Court of Appeal. Such assumption or presupposition on the part of Petitioner must necessarily be based upon his statements that there were no findings of facts below.

Petitioner's statements in this regard are absolutely untrue, not merely erroneous.

4. Question No. 4 proposed by Petitioner for review is not presented by the factual and legal circumstances of this

lawsuit and is also inappropriate and inapplicable to any review of the Judgment of the Fifth Circuit Court of Appeal herein.

The "unprescribed cause of action" alluded to by Petitioner in said Question No. 4 refers to a "cause of action" held by the District Court below to have never existed and, arguendo, to have long ago prescribed, even if it should have ever existed.

5. Respondent respectfully submits that no questions whatsoever are presented in this lawsuit, with regard to Rulings and/or Judgments of either the District Court below, or the Fifth Circuit Court of Appeal, for review by this Honorable Court. Same are on their face eminently correct.

TABLE OF AUTHORITIES

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Cases:

L. L. Brewton Lumber Co., Inc. vs. Continental Can Co., Inc., U.S.D.C., W.D. La. No. 14680 (12/11/71), affirmed 480 F.2d 923 (5th Cir. 1972) 2, 3, 12

Lee Lumber Company, Ltd. vs. International Paper Company, 321 So.2d 42 (La.App. 1975), 324 So.2d 423 (La.App. 1976), 345 So.2d 212 (La. App. 1977), 347 So.2d 503 (1977) 3

Houssiere-Latreille Oil Company vs. Jennings-Heywood Oil Syndicate, 38 So. 932 (La. 1905) 11, 12

Statutes:

Federal Rules of Civil Procedure, Rule 12(b)(6) 6
Federal Rules of Civil Procedure, Rules 56 and 56(c) 6
United States Supreme Court Rule 17 .....8, 13
Fifth Circuit Local Rule 47.6 .....7, 8, 9

LIST OF RELATED COMPANIES

In compliance with Rule 28.1, the following List of Related Companies is furnished. International Paper Company is a publically owned, international corporation and has no parent corporation. Rule 28.1 does not require the listing of wholly owned subsidiaries.

NAME	STATE OR COUNTRY OF INCOR-PORATION	PERCENTAGE OF OWNERSHIP
Androscoggin Reservoir Company 150 Main Street Lewiston, ME 04240	Maine	13%
Anthony Forest Products Company 309 No. Washington St. El Dorado, AR	Delaware	46%
Arizona Chemical Company 1600 Route 208 Fair Lawn, NJ 07410	Delaware	50%
Arizona Chemical Overseas Corporation 16-00 Route 208 Fair Lawn, NJ 07410	Delaware	50%
Arizona Chemical Service Corporation c/o CT Corporation System 8751 West Broward Blvd. Plantation, Broward County, FL 33324	Florida	50%

NAME	STATE OR COUNTRY OF INCOR-PORATION	PERCENTAGE OF OWNERSHIP
Calpine Containers, Inc. 1875 Olympic Boulevard Walnut Creek (Contra Costa County) CA 94596	California	32.80%
Calpine Sales, Inc. 1875 Olympic Boulevard Walnut Creek (Contra Costa County) CA 94596	California	32.80%
The Indian River Company 126 State Street Albany, NY 12207	New York	55.8%
Corporacion Forestal De Venezuela, C. A. Manufacturas de Papel, C. A. Apartado Postal 2046 Carmelitas, Caracas, Venezuela	Venezuela	49%
Envases International S. A. Venezuela	Venezuela	51%
IPI Corporation	Japan	51%
Productora de Papeles	Colombia	25%
Rouviere Corporation S.A. Panama	Panama	51%
Sicilcartone S.r.l.	Italy	50%

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STATEMENT OF THE CASE

Respondent submits that the best and most authoritative information regarding the factual situation and circumstances giving rise to this protracted litigation and a most concise documentation of the history of this litigation will be found in the Rulings of the District Court below in Lee II and Lee III (Petitioner's Appendix A, pages A-1 through A-20 and Appendix C, pages C-1 through C-11).

The Ruling in Lee II finds that the pleadings and exhibits therein establish the facts of said lawsuit beyond dispute. The District Court thereupon details the factual situation which it finds to have been established beyond dispute, discusses earlier litigation between the parties in the State Courts of Louisiana, both of original jurisdiction and of appellate jurisdiction, and particularly cites findings of fact, holdings and rulings of the State Courts of Louisiana.

Thereafter, the Ruling in Lee II examines and discusses in great detail and at great length the contentions and claims for relief of Plaintiff therein, Lee Lumber Company, Ltd., setting forth in some detail the Court's analysis of all of the grounds relied upon by Plaintiff therein.

Particularly, the District Court in Lee II specifically covered, discussed and ruled, adversely to Lee Lumber Company, Ltd., upon the very contentions, grounds and claims later made by this Petitioner in Lee III. A brief but careful reading of this Ruling of the District Court below in Lee II will definitively answer in the affirmative the question of whether findings of fact and application of appropriate laws of the State of Louisiana were accomplished by the District Court below in Lee II.

The Ruling of the District Court below in Lee III makes particular reference to its earlier Ruling in Lee II, as well as to earlier stages of litigation between these parties in the Louisiana Courts. This review of the facts and history of the earlier litigation in the Ruling in Lee III prefaced and tied in the actual Ruling of the Court with regard to the allegations and claims of the Complaint of this Petitioner in Lee III.

A brief but careful reading of this ruling of the District Court below in Lee III clearly reflects the findings of fact and application of appropriate Louisiana law thereto.

The Summary Judgments granted by the District Court below in Lee II and in Lee III were clearly judgments on the merits, resulting from an application by a Court of competent jurisdiction of appropriate statutory, codal and/or case law to undisputed factual situations and/or findings of fact made by the Court. Statements to the contrary by Petitioner are, at best, erroneous conceptions of the history of the litigation between the parties, covering a period of more than ten years.

Petitioner discusses from time to time in his Petition the 1971 decision by the same District Court below in *L. L. Brewton Lumber Co., Inc. vs. Continental Can Co., Inc.*, D. C., W.D.La., No. 14680, 480 F.2d 923 (CA 5 1972). Discussion of this decision will be made at points later herein. Suffice it to say at this point that the Court in that case did not have before it the question of prescription. The application of Louisiana law by the District Court below in that case is in no way analogous to the application made by the Court of Louisiana law in either Lee II or Lee III.

In his Petition (pages 8 and 9), Petitioner states that Lee I, brought in the Louisiana Courts, named no particular

cause of action. This statement is untrue (*Lee Lumber Company, Ltd. vs. International Paper Company*, 321 So.2d 42 (La. App. 1975); Ruling Lee II, Petitioner's Appendix A, pages A-1 through 5). Further, Petitioner (page 10) states that the Louisiana District Court, on remand, found that International had breached the Lease Agreement in question every year, but held Lee estopped from canceling. The Louisiana Third Circuit Court of Appeal in fact found that Lee had by its conduct acquiesced in a method or procedure of payment and had waived its right to complain. In effect, the Court found that there had been no breach, because Lee had accepted the alternate method or plan of payment, and could not now complain of breach (*Lee Lumber Company, Ltd. vs. International Paper Company*, 345 So.2d 212 (La. App. 1977); Ruling, Lee II, Petitioner's Appendix A, pages A-5 through 7).

Petitioner states (page 11) that thereafter, "having meanwhile learned" of the *L. L. Brewton Lumber Co., Inc.* decision, Lee filed Lee II in the District Court below. In truth and in fact, said decision was rendered on December 8, 1972 (Petitioner's Appendix F, pages F-1 through F-14). Petitioner, as Counsel for Lee in the lawsuit originally filed before the Louisiana District Court, not only knew of and was thoroughly familiar with said decision, but viewed it as his foundation and basic authority for initially instituting suit in Lee I. However, it is noted that Petitioner, at this same point in the Petition, specifically states and acknowledges that Lee II did recite and allege, among others, the possessory action.

In outlining the history of Lee III, Petitioner states that the District Court below held that the possessory action was stated and had not prescribed. This is not simply an erroneous conclusion, it is a knowingly false statement. The District Court ruled that International is possessing

under a valid Lease Agreement and that, therefore, there being no disturbance, the possessory action, which this Petitioner had affirmed to the District Court as his only cause of action, by personal affidavit filed with the District Court on December 13, 1982, was not a proper action before the Court (Petitioner's Appendix C, pages C-10 and 11).

Finally, Petitioner states that a new lawsuit, styled by him as "Lee IV", was filed in the District Court below, concurrently with his filing in Lee III a Petition for Rehearing in the Fifth Circuit.

As of the date of the original attempt at filing by this Petitioner of these proceedings in this Court, no service of any such lawsuit had been made, or apparently attempted, upon Respondent. During the interim period, following the rejection by this Court of Petitioner's initial filing of his Petition for Certiorari, for failure to comply with Rules of this Court, and the filing by him of the present Petition, and preceding this filing by Respondent, service of process upon Respondent in said lawsuit has been accomplished. It develops that this lawsuit, referred to as "Lee IV" by Petitioner, was in fact filed in the District Court on November 10, 1983, but not served upon Respondent's Louisiana Agent For Service of Process until March 29, 1984, the Notice, signed by Petitioner, being dated March 27, 1984. Under the present Federal Rules of Civil Procedure, Petitioner, as Plaintiff therein, had the responsibility of effecting such service of process. His delay in accomplishing same, a period of more than four months, only highlights and emphasizes the vexatious and harassing manner in which Petitioner has proceeded during the history of this litigation. Suffice it to say that said new lawsuit is simply another attempt by Petitioner to relitigate his lawsuit. Respondent submits that same is entirely without merit.

SUMMARY OF ARGUMENT

Respondent would at the outset submit to this Honorable Court as strongly as possible that it views this Petition for Certiorari as frivolous. Moreover, Respondent has always viewed Lee II as unnecessary, as all claims of Lee Lumber Company, Ltd. had been completely and finally decided in the litigation before the Louisiana Courts. Lee III is viewed as an abuse by this Petitioner of the judicial process and as vexatious and harassing litigation, from Respondent's own standpoint. The filing by this same individual of a fourth lawsuit based upon this original controversy, long ago settled by Louisiana and Federal Courts, as well as the filing in this Court of this Petition for Certiorari, may well justify imposition of sanctions by this Court and the District Court below.

Each of the reasons relied on by Petitioner in seeking a Writ of Certiorari is erroneous and facetious. Each is predicated upon either an erroneous conception or conclusion as to past and present factual and legal circumstances involved in this lawsuit, or is based upon attempts to erroneously apply misconceived legal principles to factual situations which do not exist in this lawsuit.

For the convenience of the Court, Respondent will below treat each of these stated reasons of Petitioner separately, captioned and in the same order as presented in the Petition.

1. *Affirmance on Issue Not Present Below.*

While the caption given Reason No. 1 by Petitioner is somewhat nebulous, he identifies same a bit more thoroughly

(page 19) by his statement that he takes no issue with Local Rule 47.6 itself, but with its application below.

Petitioner states (page 20) that the District Court below granted a Motion to Dismiss for failure to state a claim upon which relief could be granted, under Rule 12(b)(6), FRCP, and that there were no findings of fact in the District Court. These statements are not true.

The District Court below converted Respondent's Motion to Dismiss into a Motion For Summary Judgment, pursuant to Rule 56, FRCP (Petitioner's Appendix C, pages C-1 through C-2 and C-14 and C-15). Rule 56(c) (Petitioner's Appendix G, pages G-5 and G-6) provides for the rendering of a Summary Judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact". The decision by the District Court to convert Respondent's original Motion to one for Summary Judgment, and to grant said Motion, as so converted, necessarily required a finding that all matters of material fact were established by the record as it then existed in this lawsuit. Further, the Court (Petitioner's Appendix C, pages C-8 through C-10) identified the issues with which it was concerned in Lee III, namely, whether there had in fact been a "disturbance" under Louisiana law and, if so, whether this possessory action was brought by Lee, or by Petitioner on its behalf, with a period of one year, dating from the alleged "disturbance", being identified by the Court as the recordation of the Lease by International in 1946.

Directly ruling upon these issues of fact and law (Petitioner's Appendix C, pages 10 and 11), the District Court below held that the Summary Judgment in Lee II was dispositive of the entire claim, the Lease Agreement in question between the parties was not subject to attack and that,

this being the case, International, as Lessee, possessed under a valid Lease Agreement. Therefore, there being no "disturbance", the Court ruled that the possessory action, identified by affidavit by this Petitioner as his only cause of action in Lee III, was not a proper action before the Court in this lawsuit.

It is submitted that the reasoning of the Fifth Circuit in affirming the Summary Judgment granted by the District Court, with specific reference to Local Rule 47.6 is quite apparent. There was not involved in the consideration of the Fifth Circuit any question of the sufficiency of evidence to support a jury verdict, nor a question of an order of an administrative agency. The only other circumstances provided by Local Rule 47.6 as dispositive of a matter submitted to the Court for decision is that in which a Judgment of a District Court is based on findings of fact which are not clearly erroneous. It is most apparent that the Fifth Circuit utilized its prerogatives under Local Rule 47.6 because it found that this circumstance existed and that said Court also determined that no error of law appeared and that an opinion by the Fifth Circuit in this lawsuit would have no precedential value.

2. *Affirmance With No Indication of Grounds.*

In this section of the Petition, Petitioner continues to assert that there were in this lawsuit no findings of fact, at issue or otherwise. Respondent submits that these allegations of Petitioner are untrue, or, at best, quite apparently erroneous.

Seeking to find some basis to attempt to convince this Court to issue a Writ of Certiorari herein in exercise of its supervisory powers, Petitioner sets out that the Fifth Cir-

cuit set both Lee II and Lee III for oral argument and thus, in Petitioner's confused appreciation of the situation, determined that they were not frivolous. This conclusion of Petitioner is misleading.

Respondent submits that oral argument was called for in Lee II for the purpose of providing the Court with an opportunity to have presented by and discussed with Counsel therein for International various points of Louisiana statutory and case law having to do with relative and absolute nullities. One of the Judges sitting on the panel which heard argument in Lee II was from the State of Texas and not familiar with these particular areas of Louisiana law and stated to Counsel for International from the bench that his interest in knowing more about these questions lay behind his desire to have oral argument presented. In Lee III, this Petitioner vigorously sought oral argument and same was granted by the Court.

In his presentation of his Reason No. 2, Petitioner seems to attempt to show or imply that the Fifth Circuit has or may have so departed from the accepted and usual course of judicial proceedings as to provide a reason for this Court to exercise its powers of supervision, under Rule 17 of this Court. Nothing could be further from the true factual and legal situation in this lawsuit.

Argument and observations made hereinabove in connection with Petitioner's Reason No. 1, particularly dealing with the apparent reasoning of the Fifth Circuit in utilizing its Local Rule 47.6, are likewise applicable to Petitioner's Reason No. 2.

3. *Affirmance in Contravention of Local Rules.*

It is submitted once more that Petitioner's position that there were no findings of facts below, "dispositive" or not, is simply untrue.

Reason No. 3 presented by Petitioner is simply another attempt by him to argue an erroneous theory, based upon a factual situation which does not exist in this case.

Argument and observations made hereinabove in connection with Petitioner's Reasons Nos. 1 and 2, particularly dealing with the apparent reasoning of the Fifth Circuit in utilizing its Local Rule 47.6, are likewise applicable to Petitioner's Reason No. 3. No action taken or procedure followed by the Fifth Circuit in this lawsuit can possibly imply or be viewed as a contravention of its Local Rules. On the contrary, adherance by the Fifth Circuit to its Local Rule 47.6 is quite apparent from the record.

4. *Judgment Dismissing For Prescription of One Action, As Bar to Later Suit on Another Action.*

Petitioner makes the statement that the District Court below held in Lee III that his Complaint therein asserted a possessory cause of action which had not prescribed. He further states that the District Court therein applied the doctrine of res judicata, although it found a distinction between the cause of action expressed in Lee II and that expressed in Lee III.

These statements are false. They are not simply erroneous conclusions, they are false statements. These statements cannot conceivably be implied as holdings of the District Court in Lee III, as will be apparent from a record of the proceedings in this matter in the District Court,

particularly the Ruling of February 3, 1983 of Honorable Nauman S. Scott, United States District Judge (Petitioner's Appendix C, pages C-1 through C-11). Petitioner attempts to establish a false factual situation and then proceeds to attempt to apply thereto erroneous interpretations of codal, statutory and case law. Petitioner attempted this same approach and pursued these same erroneous theories and arguments in his appeal to and argument before the Fifth Circuit below.

The District Court, in Lee III, in granting Summary Judgment in favor of International Paper Company, found in fact that the possessory action had been one of the causes of action urged by Lee Lumber Company, Ltd. in Lee II, that same had been disposed of by the earlier Summary Judgment granted therein and that this Petitioner could not relitigate same in this lawsuit, Lee III (Petitioner's Appendix C, page C-6, footnote 6 and page C-10, footnote 10). Further, the District Court reiterated that the Lease between the parties was valid, having been held not subject to attack, and that, as International held the property in question under a valid Lease, the possessory action would not lie herein, there being no "disturbance" in fact or in law. The District Court below had no occasion or need to pass upon the question of prescription of the possessory action, as it found that no possessory action ever existed between these parties.

However, the District Court below did note in passing that, "arguendo", even if the Lease Agreement had been void, any possessory action would necessarily have had to have been brought within a period of one year following the alleged "disturbance", identified in the Complaint herein and by the Court as the filing in 1946 of the Lease Agreement between the parties. (Petitioner's Appendix C, page C-8 and page C-11, footnote 11).

The identity of actions requisite for the application of res judicata is quite apparent in this lawsuit. The District Court below found and ruled quite clearly that the possessory action had been one of the actions urged in and presented by Lee II and that the Summary Judgment granted International in Lee II was dispositive of the entire claim therein (Petitioner's Appendix C, pages C-5 and C-6, footnote 6 and page C-10). The satisfaction of the requisite of identity of the parties is so obvious herein as to obviate need for argument. Petitioner brought this lawsuit in the District Court below as a Shareholder's Derivative Action, not as his own individual right, but as a right of and on behalf of Lee, without question the Plaintiff in Lee II. There can be no question that International in Lee III is the same party as the Defendant in Lee II. The identity of the thing demanded in this lawsuit as one of the same things demanded in Lee II is also readily apparent. It cannot be said that there is any question as to the competency and jurisdictional authority of all Courts previously and presently involved in the history of this litigation. As to the finality of the Summary Judgment granted in Lee II, the record herein reflects and Petitioner admits that an appeal thereof was taken to the Fifth Circuit Court of Appeal, which affirmed the decision of the District Court therein, under date of May 15, 1980 (Petitioner's Appendix B, pages B-1 and B-2).

Petitioner seeks to mislead this Honorable Court as to the history and holdings of *Houssiere-Latreille vs. Jennings-Heywood Oil Syndicate*, 38 So. 932 (La. 1905). A careful and complete review of *Houssiere-Latreille* shows that same affirmed the decision of the lower Court, by virtue of the original Opinion of the Louisiana Supreme Court, and that, although a rehearing was had before the Louisiana Supreme Court, said rehearing also resulted in affirmation and did

not reverse the Opinion of said Court as its original hearing. Said decision of the Louisiana Supreme Court has never been overruled or reversed. Statements made by Petitioner at pages 15 and 16, footnote 15 of the Petition are untrue and thoroughly misleading. The law of *Houssiere-Latreille,* as applicable to this present lawsuit, is quite properly applied by the District Court in its Ruling in Lee III (Petitioner's Appendix C, pages C-9 and C-10).

Petitioner further alludes to the *L. L. Brewton Lumber Co.* case, supra, continuing, as he has for more than ten years, both as Counsel for Lee in Lee I and Lee II and as Plaintiff in Lee III and Petitioner herein, to conveniently disregard the obvious fact that no question of prescription was ever raised or ever entered into the consideration of the Court in that case. The District Court below did not reach a "contrary conclusion" in either Lee II or Lee III. Application by the Court of Louisiana laws of liberative prescription went to the heart of the matters in Lee II and Lee III.

From a reading of the various Rulings and Judgments of the District Court and Fifth Circuit below, in Lee II and in Lee III, it will be readily seen that the illustrative scenario visualized by Petitioner at pages 39 through 41 of his Petition for Certiorari is at very best completely and hopelessly erroneous.

CONCLUSION

A review on the Writ of Certiorari is not a matter of right, but of judicial discretion, and will be granted only where there are special and important reasons therefor. The character of reasons which will be considered by this Court is set forth in its Rule 17.

It is respectfully submitted that no reasons have been shown in these proceedings to support this request by Petitioner for the issuance by this Court of a Writ of Certiorari.

Respondent submits that the Petition for Certiorari is entirely without merit and respectfully requests that same be denied.

All of the above and foregoing is thus respectfully submitted.

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CERTIFICATE OF SERVICE

I, Merwin M. Brandon, Jr., one of the attorneys for International Paper Company, Respondent in these proceedings, being a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 8th day of June, 1984, copies of this Opposition to the Petition for Certiorari, with included or accompanying brief and argument, were mailed in duly addressed envelopes, with postage prepaid, to:

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I further certify that all parties required to be served have been served.

Merwin M. Brandon, Jr. m.m.b.j.

Merwin M. Brandon, Jr.